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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

October Term, 1969
No. 496

ALFRED TENNYSON COWGILL, *Appellant,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal From the Appellate Department of the Superior Court, Los Angeles County, State of California.

MOTION TO DISMISS.

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On Appeal From the Appellate Department of the Superior Court, Los Angeles County, State of California.

MOTION TO DISMISS.

Appellee in the above-entitled case moves to dismiss the appeal on the grounds that the questions presented are so unsubstantial as not to need further argument.

POINT I.

Most of the Questions Presented in the Jurisdictional Statement Are Not Necessary to a Determination of This Appeal and Are Not Substantial.

Appellant states that the major question here presented is whether a public act of flag defilement, unaccompanied by words, but also unaccompanied by actual or threatened violent or injurious conduct, is entitled to protection as "symbolic speech" under the First and Fourteenth Amendments. (Jurisdictional Statement, p. 4.)

In the Order Certifying Cause to Court of Appeal, which is Appendix C to the Jurisdictional Statement, the question which was certified is stated as follows:

> "Is paragraph (d) of Section 614 of the California Military and Veterans Code which makes it a misdemeanor to publicly mutilate, deface, defile or trample upon a flag of the United States constitutional when applied to an act of defilement (no words being actually spoken) which defendant claims to be protected symbolic speech under the First Amendment."

The manner in which the Appellate Department of the Superior Court stated the issue is more appropriate than the language in which the alleged major question is stated in the Jurisdictional Statement, since it appears that while Appellant claims that the act of defilement involves symbolic speech, basically the Appellate Department ruled that the states have power to protect the flag from conduct or acts of desecration and disgrace; and held that even if it be conceded that Appellant's acts were "symbolic speech," where speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in controlling the nonspeech elements can justify incidental limitations on First Amendment freedoms.

Therefore, it appears that essentially conduct, consisting of the act of flag defilement, is involved herein; and that one must unduly stretch the concept of "symbolic speech" in order to include within it the act of flag defilement.

In the Jurisdictional Statement, at page 4, Appellant states that within what it considers to be the basic

question are subsumed four subsidiary questions, which are lettered a through d. There is no real issue in this case as to whether the expression of ideas by conduct is entitled to the same protection as the expression of ideas by words. We are not concerned herein in any manner whatsoever with the expression of ideas by words; and, more particularly, we are not concerned herein with any comparison in regard to the protection to be accorded under the First Amendment to conduct in its relationship to expression of ideas by words.

Appellant raises the question as to whether a public act of flag defilement necessarily and in all circumstances constitutes an incitement to others to commit unlawful acts. There is no such issue in this case, as an examination of the Settled Statement on Appeal and the opinion of the Appellate Department of the Superior Court indicate. While the opinion of the Appellate Department does state that a state has a legitimate interest in preventing breaches of the peace and that at another time a disturbance may well have resulted from Appellant's actions, the fact that the Appellate Department made such a comment does not raise any substantial question of whether the flag defilement constitutes an incitement to others to commit unlawful acts.

Appellant states that there is a question here as to whether the governmental interest in prohibiting public flag defilement is an interest unrelated to the suppression of free expression. There is no such issue in reality in this case since it is quite apparent that the governmental interest in prohibiting flag defilement is unrelated to the suppression of freedom of expression; and that any incidental and inconsequential restriction

which Section 614 (d) of the Military and Veterans Code makes on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest. (See *United States v. O'Brien,* 393 U.S. 900, 88 S. Ct. 1673, 1679.) Furthermore, this Court may consider that Military and Veterans Code, Section 614 (d), in its prohibitions against mutilating, defacing or defiling the flag of the United States, is a regulation concerning the independent non-communicative aspect of Appellant's conduct, and hence does not violate the First and Fourteenth Amendments.

Appellant states that there is an issue in this case as to whether the wearing of a garment of clothing may constitute symbolic speech. There is no such issue herein or any substance. The Appellate Department of the Superior Court stated that they, like Chief Justice Warren speaking for the Court in *United States v. O'Brien,* 391 U.S. 367, 376,

> ". . . cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends to express an idea."

In the Jurisdictional Statement, at page 5, Appellant states that there are three additional questions presented, which are lettered a. through c. In regard to the question lettered a., there is no problem of a hostile audience here since the Settled Statement on Appeal indicates that Officer Dalrymple testified that upon his arrival he observed defendant with a group of 10 to 15 young people standing on the sidewalk in front of Winchell's Donut Shop. There is no showing of any hostility of these people towards Appellant.

As to the question labeled b., there is no real issue in this case as to whether the Due Process Clause of the Fourteenth Amendment is violated as a result of the conviction of Appellant, since as the opinion of the Appellate Department of the Superior Court states, the evidence in the instant case amply supports the implied finding of the trial court that Appellant's acts defiled the flag. (Jurisdictional Statement, Appendix A, p. 2.)

Likewise as to the alleged question lettered c., there is no serious or substantial issue in this case as to whether it constitutes a deprivation of property without due process of law to prohibit a person from converting cloth (in the form of a flag) which he owns into a garment of clothing. As Mr. Justice Fortas dissenting in *Street v. New York,* 394 U.S. 576, 89 S. Ct. 1354, 1378, stated:

> "A person may 'own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense, but it is property burdened with peculiar obligations and restrictions. Certainly, as *Halter vs. Nebraska,* supra, held, these special conditions are not *per se,* arbitrary or beyond governmental power under our Constitution."

After all the alleged Questions Presented in the Jurisdictional Statement at pages 4 and 5 are examined, it becomes apparent that there is only one real question in this case; and that question is the one heretofore quoted from Appendix C of the Jurisdictional Statement, as stated by the Appellate Department of the Superior Court in the Order Certifying Cause to Court of Appeal. When that particular question is analyzed, the only possible basis for the presentation of a constitutional issue when California Military and Veterans Code,

Section 614 (d) is applied to Appellant's act of defilement is that Appellant claims that such acts should be protected "symbolic speech" under the First Amendment. As the opinion of the Appellate Department of the Superior Court indicates, there is no substantial basis for concluding that the question of whether the wearing of the vest made out of the flag constitutes "symbolic speech" is of determinative significance in this case, since even if it be conceded that defendant's acts constituted "symbolic speech," it does not follow that the same kind or degree of freedom is afforded persons engaging in symbolic speech" by the First Amendment as is afforded to those who communicate ideas by pure speech. That is, where the speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in controlling the nonspeech element can justify incidental limitations on First Amendment freedoms. (See *United States v. O'Brien,* 393 U.S. 900, 88 S. Ct. 1673, 1679.)

In *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S. Ct. 733 (1969), this Court specifically held that the ban by public secondary school officials on the wearing of black arm bands by students as a protest against the Vietnam war violates the First and Fourteenth Amendments to the United States Constitution. However, it is quite clear that the *Tinker* case is not dispositive of the issues herein, since the *Tinker* case involves student protests against the hostilities in Vietnam which the Court deemed akin to "pure speech." On the other hand, in the instant case Appellant testified that he wore the vest because he liked bright colors and because it was attractive; and that he wore it on the day of his arrest be-

cause it was Election Day and he considered it appropriate.

Appellant was not engaged in any activities concerning advocacy of a position in regard to political or military events or in making objections or protests of any kind. In view of the foregoing, we can even assume herein that Appellant's conduct is tinged with an aspect of "symbolic speech," and still conclude that there is no substantial question in this case which merits argument before this Honorable Court.

POINT II.

Any Issue Concerning the Status of Symbolic Speech Under the First and Fourteenth Amendments Which May Exist in This Case Is Quite Unsubstantial and Does Not Merit the Attention of This Court.

Appellant asserts that the present case affords this Court the opportunity "to clarify a crucial area of First Amendment protection." (Jurisdictional Statement, p. 7.) There is no "crucial area" involved in this case. The question of whether an act of flag mutilation or defilement may be protected under the First Amendment is of no great consequence and does not merit the attention of this court, since the conclusion that the states have power to protect the flag from *acts* of desecration and disgrace deprives Appellant of the right to correctly assert that the individual may defile the flag under the guise of "symbolic speech." The conclusion of the four justices of this court, who in *Street v. New York*, 394 U.S. 576, 89 S. Ct. at 1354, 1367-1378, expressed the view that the states have this power seems to be palpably correct. The fact that there is a legitimate state interest in the protection of the flag was

recognized in *Halter v. Nebraska,* 205 U.S. 34, 51 L. Ed. 696, where this court held that a Nebraska statute which made it a misdemeanor to use representations of the national flag on articles of merchandise for advertising purposes did not deny any privilege of American citizenship, did not infringe the right of personal liberty guaranteed by the Fourteenth Amendment, and did not invade any property rights without due process of law. At most the application of the California statute to Appellant's course of conduct in this case constitutes a minimal or incidental limits upon Appellant's freedom of expression, and the overriding consideration in the substantial state interest in preventing the desecration, defilement or mutilation of the United States flag. Therefore, there is at most a rather inconsequential issue concerning symbolic speech in this case.

Appellant asserts at page 10 of the Jurisdictional Statement that this case offers a most appropriate vehicle for a definitive opinion concerning the concept of "symbolic speech." The record herein demonstrates that Appellant was being punished for his acts and conduct alone, and it is necessary to stretch the term "symbolic speech" in order to find that it exists at all in this case.

POINT III.

There Is No Substantial Issue in This Case Concerning the Status of the Veto Power of a Hostile Audience.

As indicated heretofore, in Point I hereof, there is no legitimate issue herein of the veto power of a hostile audience, since there was no hostile audience in this case. The mere reference to possible breaches of the peace in the opinion of the Appellate Department of

the Superior Court (Jurisdictional Statement, Appendix A, p. 5) was made for the purpose of indicating that the state may legitimately control activities in the interest of preventing violence and maintaining public order. This incidental reference near the conclusion of the opinion of the Appellate Department does not result in any issue in regard to a hostile audience being present in this case.

POINT IV.

There Are No Substantial Questions of Due Process Presented Herein.

It is submitted that the conclusion of the Appellate Department of the Superior Court that the evidence amply supports the implied finding of the trial court that Appellant's acts defiled the flag is the only reasonable conclusion which could be drawn from the facts presented in the instant case. In its opinion, the Appellate Department stated:

> "Defendant admitted that he caused a flag of the United States to be cut and sewn into a vest and wore the vest on the public streets. It is not necessary to determine whether the mutiliation stopped with the cutting and sewing in private or whether the entire act of cutting, sewing and wearing were so intertwined as to be one act, at least part of which was done publicly. *In any event, we feel the evidence amply supports the implied finding of the trial court that defendant's acts defiled the flag.*" (Emphasis added.)

It is submitted that under the facts found, as stated above by the Appellate Department, there is no issue herein involving an alleged denial of due process of

law, since the evidence in the record is sufficient to support the judgment of conviction.

Appellant's argument, at page 17 of the Jurisdictional Statement, that the enforcement of the statute in question against Appellant resulted in a deprivation of his right to use, and hence of his property in the cloth, does not present a question of any substance in regard to violation of the Due Process Clause of the Fourteenth Amendment. Furthermore, the dissenting opinion of Mr. Justice Fortas in *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354, 1377-1378, contains a complete answer to such assertion.

POINT V.

The Fact That the Appellate Department of the State Superior Court Requested a Decision by a Higher Appellate Court in California Does Not Lead to the Conclusion That There Are Any Substantial Questions Involved Herein.

In the Jurisdictional Statement, as Appendix C, there is an order of the Appellate Department of the Superior Court Certifying Clause to the Court of Appeal. That order contains an accurate statement of the real question presented in this case. As Appendix D of the Jurisdictional Statement indicates, the Court of Appeal of the State of California ordered that the transfer of the cause to itself be denied. The latter court, however, suggested that the Appellate Department of the Los Angeles Superior Court publish the opinion which it had rendered.

The fact that the Court of Appeal refused to transfer the cause, after request for certification was made by the Appellate Department, merely indicates that the

Court of Appeal did not find any basis for the conclusion that the Appellate Department committed error in connection with its determination of the appeal. In other words, the Court of Appeal was satisfied that the opinion of the Appellate Department and the reasoning thereof were fundamentally sound; and that, in the event the case would have been before the Court of Appeal, the same disposition would have been made by that court as was made herein by the Appellate Department.

Furthermore, it may be implied from the fact that the Court of Appeal refused to order that the matter be transferred to it, that said Court of Appeal agreed with the statement of the issue in the Order Certifying the Cause to the Court of Appeal. Appellee submits that the only correct statement of the issue presented in this case is the statement in the Order Certifying Cause to Court of Appeal. (Jurisdictional Statement, Appendix C.) In analyzing the question so presented, the most that can be said for Appellant's contentions herein is that Appellant claims the act of defilement of the flag is protected as "symbolic speech" under the First Amendment the lack of substance of this claim has been noted heretofore.

Appellee submits that the opinion of the Appellate Department of the Superior Court in his case has properly analyzed the facts and has correctly applied governing principles of constitutional law to the facts. Appellee submits that in view of that opinion of the Appellate Department, there is no substantial issue for the consideration of this Court.

Conclusion.

In view of the foregoing points and authorities, it is submitted that the questions presented herein are not substantial, and the motion to dismiss the appeal should be granted by this Court.

Respectfully submitted,

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